



1 Defense (“DOD”), and systematically deleted all source code<sup>1</sup> files from the remaining eTreppid  
 2 data servers, all in violation of 18 U.S.C. § 1832, Theft of Trade Secrets, and 18 U.S.C. § 793(e),  
 3 Unlawful Retention of National Defense Information. *Id.*

4 On March 10, 2006, Montgomery filed a motion to unseal the search warrants and  
 5 affidavits and for the return of property pursuant to Fed. R. Crim. P. 41(g) and for the segregation  
 6 and sealing of all attorney-client privileged materials seized (#21). This motion is currently  
 7 pending before the court. On September 15, 2006, eTreppid filed its motion seeking return of the  
 8 seized property to eTreppid (#72). On October 16, 2006, Montgomery filed an opposition (#84);  
 9 however, Montgomery did not serve eTreppid with the opposition because these proceedings are  
 10 sealed. Legal ownership of the property seized pursuant to the search warrants is claimed by both  
 11 Montgomery and eTreppid and is contested in separate federal civil actions. *See Dennis*  
 12 *Montgomery, et al. v. eTreppid Technologies, Inc., et al.*, 3:06-CV-0056-LRH (VPC) and  
 13 *eTreppid Technologies, Inc., et al., v. Dennis Montgomery, et al.*, 3:06-CV-0145-LRH (VPC),.

## 14 II. DISCUSSION & ANALYSIS

### 15 A. Discussion

16 Federal Rule of Criminal Procedure 41(g) generally is used to seek the return of property  
 17 after an indictment is issued; however, “district courts have the power to entertain motions to  
 18 return property seized by the government when there are no criminal proceedings pending against  
 19 the movant.” *Ramsden v. United States*, 2 F.3d 322, 324 (9th Cir. 1993). “These motions are  
 20 treated as civil equitable proceedings, and, therefore, a district court must exercise ‘caution and  
 21 restraint’ before assuming jurisdiction.” *Id.*

22 Before the court can reach the merits of a pre-indictment motion pursuant to Rule 41(g),  
 23 the court must consider whether: (1) “the Government displayed callous disregard for the  
 24 constitutional rights of the movant; (2) the movant has an individual interest in and need for the  
 25 property he wants returned; (3) the movant would be irreparably injured by denying return of the  
 26

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27 <sup>1</sup>Montgomery asserts that the term “source code” is meaningless and that the Montgomery Family  
 28 Trust owned the software pursuant to copyrights filed years before Montgomery’s involvement with Trepp  
 (#21).

1 property; and (4) the movant has an adequate remedy at law for the redress of his grievance.”  
2 *U.S. v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005) (internal citations omitted). If the balance of  
3 equities favors reaching the merits, the court should exercise its equitable jurisdiction to entertain  
4 the Rule 41(g) motion. *Ramsden*, 2 F.3d at 326.

#### 5 **B. Analysis**

6 In its Rule 41(g) motion, eTreppid requests the return of the property seized from  
7 Montgomery’s premises pursuant to the FBI search warrants, arguing that eTreppid is the owner  
8 of the property and thus entitled to lawful possession (#72). eTreppid argues that it has standing  
9 to bring this motion because it is a “party aggrieved” by the deprivation of the property. *Id.*

10 As an initial matter, the Court notes that this proceeding is sealed. eTreppid is not a party  
11 and neither eTreppid nor its counsel has been privy to the evidentiary hearings or the papers filed  
12 in this case. Nevertheless, the Court will discuss the equitable jurisdiction factors for the limited  
13 purpose of determining whether to exercise jurisdiction over eTreppid’s motion.

14 Since this is a pre-indictment motion for return of property, the court may, at its  
15 discretion, exercise equitable jurisdiction pursuant to the *Kama* factors. Regarding the first factor,  
16 eTreppid specifically contends that the March 1 and 3, 2006 searches of Montgomery’s house and  
17 storage units was lawful (#72). Moreover, eTreppid does *not* contend that the searches violated  
18 eTreppid’s constitutional rights. *Id.* Indeed, eTreppid was not a party to the search warrant nor  
19 were its premises searched. Thus, this factor weighs against the court exercising equitable  
20 jurisdiction.

21 The second factor pertains to ownership interests. Both eTreppid and Montgomery claim  
22 an ownership interest in the seized property and argue that they need the computers for use in  
23 their businesses. However, the legal ownership issue is the subject of at least two pending civil  
24 proceedings involving, among other things, the interpretation of private contracts and ownership  
25 agreements and the determination of who owns copyright and trade secret information. Although  
26 eTreppid cites a number of cases in support of its motion, it does not cite, and the court is unable  
27 to find, any cases that permit this court to determine these complex ownership issues in a pre-  
28

1 indictment Rule 41(g) motion setting. eTreppid cites *United States v. Hess*, 982 F.2d 181 (6th  
2 Cir. 1992), which resolved the ownership issue in a Rule 41(g) context. However, that was a  
3 *post-indictment* case; therefore, the court did not address jurisdiction or standing issues. A pre-  
4 indictment Rule 41(g) motion pursuant to the court's equitable jurisdiction is not the forum in  
5 which to decide these ownership issues, particularly in light of the ongoing civil litigation in  
6 which these issues are central to the disputes. This factor weighs against the court exercising  
7 equitable jurisdiction.

8       Regarding the third factor, eTreppid argues that it will be irreparably harmed if the court  
9 denies return of the property to eTreppid (#72). eTreppid contends that "Montgomery  
10 misappropriated this property from eTreppid's facilities because eTreppid did not give him  
11 permission to take possession of these computer hard drives" and that as such, it is suffering  
12 "continuous operating losses and lost business opportunities." *Id.* However, whether  
13 Montgomery "misappropriated" the property or whether Montgomery had legal right to the  
14 property will be decided in civil proceedings as noted above. Nevertheless, eTreppid does make  
15 a number of arguments that show it might be harmed without the return of the property. eTreppid  
16 lists business losses, the possibility that Montgomery will delete information, and the possibility  
17 that Montgomery will have access to eTreppid's trade secrets should he obtain possession to the  
18 property. Montgomery also contends that he will be harmed without the property because he  
19 owns the trade secrets on the hard drives and needs the property for his own business. It is fairly  
20 clear that the proper owner, whoever that may be, would be injured by the court's failure to return  
21 the property. However, as noted above, without knowing to a certainty to whom the property  
22 belongs, the court cannot conclude that eTreppid will suffer irreparable harm. This factor weighs  
23 against eTreppid.

24       Finally, eTreppid argues that it does not have an adequate remedy at law to redress the  
25 injury caused by the deprivation of the property. eTreppid contends that the Government refuses  
26 to return the property without a court order because of pending court proceedings. Citing  
27 *Ramsden* for the proposition that when the Government does not plan to prosecute, the party  
28 seeking return of his or her property has no recourse and a court should exercise equitable

1 jurisdiction, eTreppid argues that it has no remedy because the Government has not brought an  
2 investigation or an action against it in which it may challenge the Government's possession of  
3 the property. However, *Ramsden* is distinguishable because here, unlike *Ramsden*, eTreppid was  
4 not the subject of the search warrant. Further, unlike *Ramsden*, eTreppid *does* have an adequate  
5 remedy at law through the civil cases currently pending that will determine ownership of the  
6 disputed property.

### 7 III. CONCLUSION

8 The Government seized the property from Montgomery's premises, not eTreppid's.  
9 eTreppid was not the subject of the search warrant, and it is not clear that eTreppid even has  
10 standing to request the return of the property. Moreover, there are two pending civil proceedings  
11 that will resolve whether eTreppid or Montgomery owns the property in dispute. This proceeding  
12 is sealed and limited to the Government and Montgomery. eTreppid has not shown (1) a violation  
13 of its constitutional rights, (2) that it owns the property or (3) that it does not have an adequate  
14 remedy at law. This court concludes that the equities do not balance in favor of eTreppid and  
15 declines to exercise equitable jurisdiction.

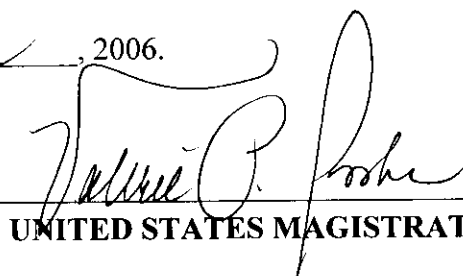
16 Based on the foregoing and for good cause appearing,

17 **IT IS ORDERED** that eTreppid's motion for return of seized property pursuant to Federal  
18 Rule of Criminal Procedure 41(g) (#72) is **DENIED**.

19 **IT IS FURTHER ORDERED** that although this proceeding is sealed, eTreppid shall be  
20 provided a copy of this order.

21 **IT IS SO ORDERED.**

22 Dated this 28<sup>th</sup> day of November, 2006.

23  
24  
25   
26 UNITED STATES MAGISTRATE JUDGE  
27  
28



**United States District Court  
District of Nevada**

Bruce R. Thompson U.S. Courthouse and Federal Building  
400 South Virginia Street, Room 404  
Reno, Nevada 89501

Chambers of Valerie P. Cooke  
United States Magistrate Judge

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United States Magistrate Judge

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